No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR INC., OVERSTOCK.COM, INC. AND NEWEGG, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF OF *AMICUS CURIAE* AMERICANS FOR TAX REFORM IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

This *amicus curiae* brief in support of Respondents' position is filed by the Americans for Tax Reform ("ATR"). ATR is a non-profit 501(c)(4) organization that represents the interests of the American taxpayers at the federal, state, and local levels. ATR has no parent companies, subsidiaries, or affiliates, other than the American Tax Reform Foundation, with which it shares its board and staff. No publicly held corporation has an ownership stake of 10% or more in ATR.

ATR is based in Washington, D.C. and represents the interests of taxpayers across the country. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. ATR educates citizens and government officials about sound tax policies to further these goals. This case involves an important tax policy issue on which ATR has testified and otherwise written extensively about the taxpayer burdens of expanded tax nexus. As such, ATR has an institutional interest in ensuring that the physical-presence standard is upheld and that the U.S. Supreme Court continues to defer to Congress in the regulation of interstate commerce. Such deference is essential in order to protect taxpayers from taxation without representation.

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1. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae certify that no counsel for any party to this matter authored this brief in whole or in part. Counsel also certifies that no person other than amicus curiae, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Both parties have filed blanket consents with the Clerk of this Court consenting to the filing of briefs by *amici curiae*.

SUMMARY OF THE ARGUMENT

The Supreme Court has followed the precedent of *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967) ("*Bellas Hess*") for over 50 years. In that time, the Court has clarified and emphasized its reluctance to allow states to tax entities that operate outside their borders. In 1992, the Court revisited the *Bellas Hess* rule in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) ("*Quill*"); in the absence of congressional action, the Court chose to uphold and reinforce its decision in *Bellas Hess*. Despite the change in technology over the last 25 years, the reasons behind the Court's affirmance of the *Bellas Hess* rule remain sound, and the law should not change simply because a new medium exists for ordering products.

The second half of the argument focuses on the policy and practical considerations if the Court were to reverse *Quill*. There are severe policy concerns for the impact it would have on small retailers doing business online. These businesses lack the necessary resources to manage the burdensome requirements that would result from the repeal of *Quill*. Finally, a reversal of *Quill*—and the establishment of the new standard that would replace its physical-presence rule—is best left up to Congress, and to grant this petition would encourage other states to pass unconstitutional laws as a means of attempting to force reversals of decisions with which they disagree. For these reasons, the Court should deny the petition for certiorari.

ARGUMENT IN SUPPORT OF RESPONDENTS

I. The Court has maintained the same approach to taxing entities without a physical presence in the taxing state since 1967, and that precedent should not change.

Dating back over 50 years, the Court has unwaveringly held that a state may not tax a remote entity that has ties to the state only via common carrier. *See National Bellas Hess* v. *Dep't of Revenue*, 386 U.S. 753 (1967). The Court affirmed the precedent set in *Bellas Hess* in *Quill*, which has become the leading precedent with respect to the taxation of remote entities and should remain the leading precedent going forward.

The legal doctrine of *stare decisis*, of course, is highly relevant to this matter. *See, e.g., Lee* v. *Weisman*, 505 U.S. 577, 632 (1992) ("Our Constitution cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court," but "must have deep foundations in the historic practices of our people."). In 1992, the Court affirmed the particular importance of *stare decisis* in the context of questions governed by the dormant commerce clause, upholding the physical-presence standard set forth in *Bellas Hess* and highlighting Congress's ability to change that standard. *See Quill*, 504 U.S. at 317 (writing that "the interest in stability and orderly development of the law" pointed toward maintaining the physical-presence standard on *stare decisis* grounds). Therefore, in the instant matter, the South Dakota Supreme Court correctly concluded that the 1992 *Quill* decision remains the controlling precedent and has "direct application" to this matter. *State of South Dakota v. Wayfair, Inc.*,

2017 S.D. 56, ¶ 18, 901 N.W.2d 754, 761 (citation omitted) ("*Wayfair*").

While South Dakota urges the Court that the time has come to overturn *Quill*, ATR urges the court to affirm its longstanding precedent, both because of the benefits of that standard and because the virtues of *stare decisis* that drove the Court to uphold *Bellas Hess* in 1992 are even more valid in 2017, with businesses having relied on that standard for another 25 years since *Quill*. As in the present case before the Court, in *Quill* the petitioner was a mail order company that did not have any physical presence in North Dakota. *Quill*, 504 U.S. at 301. The only difference between the facts in the present case and *Quill* is the technology used to view and purchase the products. In *Quill*, the business solicited with catalogs and flyers; today, the consumers visit a website to make purchases. The Court has continuously held that a vendor whose only connection to the state is a common carrier lacks a "substantial nexus" with the state required by the commerce clause; therefore, a tax collection obligation on remote sellers has been rejected since *Bellas Hess* whenever the seller lacks physical presence with the state. *Id.* at 304.

The Supreme Court of South Dakota therefore correctly held that without an entity having physical presence in the state, South Dakota is prohibited under the dormant commerce clause from imposing a tax collection obligation on such entity. The Supreme Court rejected any distinction between *Quill* and the present case, thus holding the instant law unconstitutional. *See Wayfair*, 2017 S.D. at ¶ 18.

The *Complete Auto Transit* decision created a four-part test that was applied in *Quill*. It provides that a tax is constitutional only when it:

1. "[I]s applied to an activity with a substantial nexus with the state";

2. "[I]s fairly apportioned";

3. "[D]oes not discriminate against interstate commerce"; and

4. "[I]s fairly related to the services provided by the state."

Complete Auto Transit v. *Brady*, 430 U.S. 274, 311 (1976).

In *Quill*, this Court primarily looked to the first step of the *Complete Auto* analysis to determine that under the dormant commerce clause, when a vendor's only connection with customers in a taxing state is the use of a common carrier to deliver goods, such vendors "are free from state imposed duties to collect sales and use taxes." *See Quill*, 504 U.S. at 315; *see also Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d 1129, 1145 (10th Cir. 2016). The South Dakota law in question states that "any seller selling tangible personal property, products transferred electronically . . . who does not have physical presence in the state . . . shall remit the sales tax and shall follow all applicable procedures and requirements . . . as if the seller had a physical presence in the state." S.D. Codified Laws § 10-64. This provision plainly violates the first prong of the *Complete Auto* test as interpreted in *Quill*.

The holding of *Quill* created a "safe harbor" for those whose only connection to the state is via common carrier. *Quill*, 504 U.S. at 315. There is a startling side effect to a law which asserts that anyone who accesses the website of a business without physical presence in a particular state is drawn into that state's taxing power. This would in essence blur the lines of the state border and make any entity engaging in any business outside of its borders—and with citizens of any state—susceptible to the taxation power of a state with a law similar to South Dakota's SB No. 106. South Dakota's law not only creates bad policy, but it also upsets more than 50 years of reliance on *Bellas Hess* and *Quill* by businesses—the very reliance that the Court cited in *Quill* as justification for its holding. The fact that the medium of ordering the products has changed does not mean that the laws revolving around taxing remote transactions should change with it. By accepting South Dakota's petition and reversing the decision of the South Dakota Supreme Court, the Supreme Court may indicate that *any* Internet activity in the state would enable a state to stretch its borders as far as it can reach over the internet to *any* entity that a citizen of the state may access online. *See Quill*, 504 U.S. at 315 (writing that the bright line test serves to "firmly establishes the boundaries of legitimate state authority to impose a duty to collect taxes").

Furthermore, under the dormant commerce clause, Congress has the authority to resolve these issues. Absence of congressional legislation does not empower the Court to legislate a judicial solution to a legislative problem. *Direct Mktg. Ass'n*, 814 F.3d at 1148. Given the long-standing precedent—and the reasons given in reaching that precedent—this Court would be undermining the power of

its own precedents (in the state tax arena and elsewhere) if it were to reverse its consistent and reliable physical-presence standard on which businesses have relied since 1967. Accordingly, it is incumbent on this Court to reject South Dakota's efforts to reshape established precedent on which businesses have relied. *See, e.g., Direct Mktg. Ass'n* v. *Brohl*, 814 F.3d at 1147 ("Judges distinguish themselves from politicians by the oath they take to apply the law as it is, not to reshape the law as they wish it to be.").

II. The policy considerations addressed in *Quill* should be addressed by Congress rather than the Court.

It is imperative that the digital tax borders are limited to retailers that carry a physical presence in the jurisdiction. If *Quill* is overturned, the lines between who can be taxed will blur, forcing retailers—including many small businesses—to engage in costly practices to ensure they can keep up with the tax laws of numerous states, which can vary, *inter alia*, as to what is taxable; what is exempt; the tax rate; the degree to which taxes are centrally administered; and the deadlines by which taxes must be remitted and when reports must be filed. Brick and mortar retailers are only responsible for collecting tax in the jurisdictions in which they have physical presence, where an e-commerce retailer could be subject to a tax collection obligation in thousands of taxing jurisdictions. This burden is likely to be pushed onto consumers, and it is detrimental to smaller e-commerce retailers, potentially preventing them from expanding into new markets. Some small businesses will even be forced to choose *not* to sell into particular markets because the costs of compliance

will not justify the potential sales.[2] Even if a state's tax collection law includes the provision of "free software and installation," the maintenance and upkeep would cost thousands of dollars, providing large barriers to smaller businesses (not to mention the fact that software made available by a government for free is likely to lack the bells and whistles of software that larger businesses utilize, furthering the divide between such large and small entities).[3]

South Dakota's law would draft e-commerce retailers to serve as a tax collector, "forcing online retailers in other states to do their dirty work for them."[4] This would force small businesses to have to identify and comply with thousands of taxing jurisdictions, without recourse to any elected official. A change to South Dakota's tax collection regime would impose a heavy burden on retailers with issues ranging from determining how a product should be taxed (*e.g.* determining whether a food should be taxed as candy, or be tax exempt)[5] to how to collect, remit, and

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2. *See* Joseph Bishop-Henchman, "Why the Quill Physical Presence Rule Shouldn't Go the Way of Personal Jurisdiction," STATE TAX NOTES (Nov. 5, 2007), available at https://taxfoundation.org/why-quill-physical-presence-rule-shouldnt-go-way-personal-jurisdiction/.

3. *See, e.g.*, Katie McAuliffe, *Taxation without Representation; The Collateral Damage of Crony Capitalism*, Americans for Tax Reform (Nov. 16, 2015), available at https://www.atr.org/taxation-without-representation-collateral-damage-crony-capitalism.

4. *Id.*

5. James Gattuso, *Taxing Online Sales: Should the Taxman's Grasp Exceed His Reach*, The Heritage Foundation (2013), available at http://www.heritage.org/taxes/report/taxing-online-sales-should-the-taxmans-grasp-exceed-his-reach; *see also* Katie McAuliffe, *supra* note 3.

report taxable and exempt sales in every jurisdiction that imposes a collection obligation on sales to customers located in that jurisdiction. The costs are not limited to technology: complying with South Dakota's law will also require man-hours to handle a variety of tax-compliance-related tasks, including accounting issues, audits and other inquiries from taxing authorities, and dealing with tax-exempt customer claims.[6]

When an entity has no physical presence or other contacts in a state, it has no say into the laws governing its conduct; along the same lines, of course, such entities receive little to no benefits from the taxes that they are required to collect and remit to such state(s).[7] Yet if the Court were to reverse *Quill*, "retailers would be subject to edicts and mandates from States with which they have no connection," without the practical ability to respond, given that they have no voting power over the legislators implementing the new, overreaching tax collection regulations.[8]

As this Court has already stated, it is not this Court's role to legislate a solution to this issue; in *Quill*, the Court recognized that any corrective action must come from Congress. *See Quill*, 504 U.S. at 317 (noting that reaffirming the physical presence standard was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve.").

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6. *See* James Gattuso, *supra* note 5.

7. *Id.*

8. *Id.*

Indeed, Congress has been in the midst of robust debate on this topic for years, with proposed legislation introduced in previous terms and in the current Congress. *See, e.g.*, H.R. 2887 (the "No Regulation Without Representation Act of 2017," which would codify the physical presence requirement for e-commerce). Because the legislative process is in motion (as this Court intended), the Supreme Court should defer to Congress in this matter; the fact that Congress is *perhaps* taking longer than the Court envisioned in 1992 has no effect on the particular force of *stare decisis* in this context (though it is far from a given that the Court in *Quill* expected that Congress would change the physical-presence standard set forth in *Quill* before 2017, if it had any expectations at all regarding the timing of such a change).

III. Accepting this case would encourage unconstitutional state action and threaten the rule of law.

State official or legislative actions in contravention of binding court precedent are challenges to the rule of law, and such acts could yield dangerous consequences in areas of public policy that are more politically charged than tax collection. States should not purposefully enact laws they know to be unconstitutional to antagonize courts in an attempt to push for a policy change. While asking courts to clarify areas of unsettled law is important to the evolution of law, the matter presented here—the passage of an unconstitutional law with the explicit intent of getting the Court to revisit and reverse settled precedent—chips away at the rule of law by challenging the vitality of, and respect for, this Court's holdings.

The state's intent in passing this unconstitutional law was not a secret. With full knowledge of the *Quill* holding, the South Dakota State Senator Deb Peters worked with both the governor and state attorney general to draft and pass legislation for online sales tax collection in order to draw a challenge to pursue to the United States Supreme Court. As intended, the day after passage of SB 106, taxpayers and taxpayer organizations filed suits to challenge the law's constitutionality.

Further, the state's behavior before the South Dakota Supreme Court was incredibly unusual. South Dakota had already conceded to the Sixth Judicial Circuit that the enacted statute is in conflict with *Quill*. Then South Dakota asked that the Sixth Circuit decision be upheld—that is, the state asked the Court to rule *against* the constitutionality of its law—in order to allow for the state to "fast track" this petition for certiorari to the U.S. Supreme Court. The state's conduct demonstrates a clear strategy to drive a matter of policy before the Court. While a state may of course seek clarification from courts on certain legal matters, it is an entirely different story when a state disregards constitutional precedent to force a desired review of a law or ruling. It offends the separation of powers between the federal government and the states if a state responds to a binding decision of this Court (or any state or federal court) by throwing its proverbial toys out of the pram.

The Supreme Court in *Quill* told the states exactly whom they should ask for a change to that decision's holding: Congress. And Congress is deliberating with respect to whether, and to what extent, to permit states to impose a tax collection obligation on remote sellers.

Congress's role in regulating interstate taxation and reviewing the taxation of remote sellers was not a footnote to *Quill*; rather, it is part of the Court's core holding. Thus, *Quill* was not an act of legislating from the bench, but instead a careful act of judicial restraint in which the Court refused to upset an area of settled law. Technology may have changed since *Quill*, but *stare decisis* remains the same, and its force in this matter is as strong in 2017 as it was in 1992.

Should the Court choose to accept South Dakota's petition and provide a favorable ruling to South Dakota, the Court would set a model that encourages states to pass laws directly in conflict with precedent, federal law, and the U.S. Constitution, rather than stay within their constitutional bounds and respect the rule of law. This is a tax case, which does not exactly set hearts racing. But it is not difficult to imagine a much more dangerous atmosphere if a state were to attempt the same stunt in a matter involving the scope of other constitutional amendments that involve life and liberty rather than dollars and cents. Accordingly, the Court should deny this petition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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